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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL JACKSON, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	Case No. CV 91-4249-R **[DEATH PENALTY]** NARRATIVE STATEMENT OF DIRECT TESTIMONY OF LESLIE H. ABRAMSON, ESQ. DATE: January 24, 1996 TIME: 9:00 a.m. PLACE: Courtroom 8

1. I am Leslie H. Abramson, Esq., and this is the narrative statement of my direct testimony as an expert witness called by petitioner, Michael Jackson, to render the following opinion:

MR. KLUMP'S ERRORS AND OMISSIONS BEFORE AND DURING THE GUILT AND PENALTY PHASES OF PETITIONER'S TRIAL FELL BELOW OBJECTIVE STANDARDS OF REASONABLY COMPETENT LEGAL ASSISTANCE UNDER CURRENTLY PREVAILING PROFESSIONAL NORMS. MR. KLUMP'S PERFORMANCE DID NOT MEET THE SIXTH AMENDMENT'S REQUIREMENTS OF MINIMALLY EFFECTIVE ASSISTANCE AS SET FORTH IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S.CT 2052, 80 L.ED.2D 674 (1984).

I.

QUALIFICATIONS AS EXPERT

2. I have been consulted by the firm of Lewis, D'Amato, Brisbois & Bisgaard, attorneys for petitioner, to be an expert witness as to Mr. Jackson's case on the issue of the effectiveness of the assistance rendered to Mr. Jackson by his trial counsel, Mr. Klump, of the Los Angeles County Public Defender's Office. I have been consulted as an expert in this capacity based on: my experience consulting and testifying as an expert on effective assistance of counsel in prior cases, my years of personal experience as a public defender; my experience with the criminal justice system as a private practitioner especially in the area of death penalty trials; my experience as a lecturer, instructor, and member of various committees and organizations related to the practice of criminal law and death penalty defense. On January 21, 1993, this Court appointed me as the attorney expert witness in this action and authorized funds for my services.

3. My prior experience as an expert witness testifying as to the effective assistance of counsel in criminal proceedings includes the following cases and matters: *In re Stevie Fields* (State Habeas Corpus), 51 Cal.3d 1063; *People v. Ackerman* (State Appeal) (unpublished opinion).

4. I obtained a Bachelor of Arts degree at Queens College, New York, in 1964. In 1969, I obtained a J.D. from UCLA Law School, where I was a member of the Order of the Coif. I was admitted to the California Bar in 1970. I began my legal career with the Los Angeles County Public Defender's Office. I was a senior law clerk for that office from September 1969 to January 15, 1970. I was a Deputy Public Defender from January 15, 1970 to November 12, 1976. From July 1973 to November 1976, I was assigned to Central Felony trials. During this time, I handled over 600 felony cases and over 40 felony jury trials, which included charges of murder, rape, robbery, kidnapping, arson, burglary, grand theft, child molesting and major fraud. I have been in private practice since November 1976 and since 1977 have specialized in representing defendants in capital murder cases. I have handled 14 such cases including 8 completed jury trials. Only one of my capitally accused clients received a sentence of death.

5. I have lectured extensively on criminal defense. My lectures have included the following topics: preparation, discovery, trial tactics and techniques in death penalty cases; self-defense in homicide cases; cross-examining eye witnesses; and jury selection in criminal cases. I am a past member of the Federal Indigent Defense Panel, United States District Court, Central District of California. I was the committee chair for the Los

Angeles County Bar Indigent Criminal Defense Appointments Committee from 1989 to 1990 and am still a member of the committee. I am a past president of California Attorneys for Criminal Justice, (CACJ) and the former chair for that organization's Death Penalty Committee.

6. I have reviewed the recorded transcript of the trial of *People v. Jackson*, L.A.S.C. Case No. A530714 ("Jackson's trial"), police statements and witness statements compiled before that trial, declarations of Dr. Orm Aniline filed with this Court, medical records of petitioner from Queen of the Valley hospital and Los Angeles County hospital made after the incident, records from petitioner's juvenile court file, and the transcript of recorded interviews of petitioner's trial counsel, William Klump ("Klump") conducted by petitioner's present counsel, Allyn O. Kreps and attorneys from Lewis, D'Amato, Brisbois & Bisgaard.

7. I also have reviewed extensively the results of the discovery conducted by petitioner and respondent. In particular, I have reviewed the public defender's files concerning petitioner's case, and the deposition transcripts of William J. Klump, Robert J. Bund, Peter M. Williams, Michael J. Lee, Michael T. Bumcrot, Sabino Muniz, Joseph A. Guzman, Frank Howard Harden, IV, Letitia Whittington, and Sabrina Jackson. I also have reviewed the Declaration of Gerald Osacho dated November 9, 1995, Declaration of Lucinda Ann Vlahos dated August 11, 1995, Declaration of Matthew Williams dated August 11, 1995, Declaration of Pierre L. Lynd dated August 11, 1995, Declaration of Ermalinda Aceves dated November 6, 1995, Declaration of Lillian Smith

Morrissette Williams dated November 5, 1995, Declaration of Albert Lee Smith dated November 5, 1995, Declaration of Cornellius Smith dated November 7, 1995, Declaration of Juanita Smith Cooper dated November 7, 1995, Declaration of Berry Smith Ballard dated November 7, 1995, Declaration of Robbie Lee Smith Cochee dated November 5, 1995, Declaration of Anthony Jackson dated November 5, 1995, Declaration of Arthur Jerome Morrissette dated November 3, 1995, Declaration of Vincent Rory Morrissette dated November 4, 1995, Declaration of Ronald S. Terzino dated November 6, 1995, Declaration of Robert Hinds dated October 19, 1995, Declaration of Jay M. Jackman, M.D. dated November 12, 1995, Declaration of Patricia M. Andrews dated November 6, 1995, Declaration of Pamela Jackson dated December 8, 1995, Declaration of Patricia Williams dated December 8, 1995, Declaration of Arthur Morrissette dated December 7, 1995, Declaration of Patricia Williams dated December 27, 1995, Declaration of Pamela Jackson dated December 27, 1995, and Declaration of and Jay M. Jackman, M.D. dated December 29, 1995.

II.

COUNSEL'S ERRORS AND OMISSIONS AT THE GUILT PHASE OF TRIAL VIOLATE THE SIXTH AMENDMENT

8. I have concluded that defense counsel William Klump's errors and omissions before and during trial fell below objective standards of reasonably competent legal assistance under currently prevailing professional norms, and that his deficient performance prejudiced petitioner's defense in both guilt and penalty trials. In my opinion,

Mr. Klump's performance at the guild phase of trial did not meet the Sixth Amendment's requirements of minimally effective assistance as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

9. Petitioner's shooting of Officer Wrede on a public street in West Covina in broad daylight and the confrontation and altercation between petitioner and the Officer that immediately preceded the shooting was observed by numerous witnesses. Petitioner was apprehended at the scene within moments of the shooting by several police officers and promptly arrested. There was no issue of identity of the perpetrator presented by these facts. The only available defense to the charge of first degree murder and the special circumstance of killing a police officer engaged in the performance of his duties was one of impaired mental state. Mr. Klump apparently recognized that this was his only avenue of defense since the thrust of his efforts during cross-examination of the prosecution's witnesses and his own presentation of witnesses seemed to be aimed at establishing petitioner's drug intoxication. Mr. Klump's efforts, however, were feeble at best because he:

(a) lacked familiarity with the eyewitnesses' observations;

(b) failed to prepare adequately or to utilize meaningfully the expertise of his medical expert;

(c) failed to obtain vital post-arrest treatment records of his client;

(d) failed to call as a witness the forensic psychiatrist who had examined petitioner;

(e) failed to interview nine of the thirteen defense witnesses prior to their testifying;

(f) failed to move to suppress petitioner's stuporous statements to the investigating officers;

(g) failed to develop through cross-examination or to explain to the jury those officers' potential motives to fabricate petitioner's statements or to misrepresent petitioner's condition at the time of the taking of those statements;

(h) failed to develop through expert testimony the casual connection between PCP intoxication and the inability of his client to entertain the requisite mental states for first degree murder;

(i) failed to present evidence establishing petitioner's addiction to drugs or to explain the compulsive, involuntary nature of drug addiction;

(j) failed to explore potential juror biases against this unemployed, previously convicted, drug-using, black man accused of killing a young, hardworking, white police officer; and

(k) failed to argue meaningfully to the jury the significance of petitioner's intoxication and the impairment of his mental abilities as they related to the elements of the crime charged rendered his performance not only ineffectual but incompetent.

A. Defense Counsel's Failure to Investigate The Facts Of The Case And Prepare For The Guilt Phase Of Trial Fell Below Standards of Reasonably Competent Assistance

10. Evidence available to counsel before trial strongly supported the conclusion that, due to multiple drug intoxication, petitioner was both physiologically and psychologically incapable of premeditating, deliberating, harboring malice or forming the specific intent to kill at the time he fired the fatal shot resulting in the death of Officer Wrede.

11. This evidence included, but was not limited to:

(a) witness statements describing petitioner's erratic and bizarre behavior before, during and shortly after the shooting, which these observers opined was caused by drug ingestion;

(b) medical records from Queen of the Valley and Los Angeles County General hospitals, where petitioner was treated within hours of the incident, which contained the diagnoses that he was profoundly intoxicated on phencyclidine ("PCP");

(c) the results of chemical tests of petitioner's blood, drawn within two hours of the incident, which revealed the presence of 176 nanograms per milliliter (ngs/ml) of PCP, a level of intoxication that would affect the exercise of petitioner's rational faculties;

(d) the results of chemical tests of petitioner's urine, sampled within two hours of the incident, which revealed the presence of cocaine and amphetamines, which would

have contributed as well to the impairment of petitioner's cognitive ability;

(e) police reports containing the observations of police officers who had arrested petitioner in the year prior to the incident for PCP intoxication, which described behavior similar to that exhibited by petitioner on the day of the incident;

(f) probation reports reflecting petitioner's juvenile addiction to chemical substances;

(g) readily available information from petitioner's family members, friends and neighbors describing petitioner's long-term history of chronic, multi-drug addiction; and

(h) readily available information and opinions from medical and psychiatric experts that persons who have ingested a quantity of PCP producing the test results in this case, are so cognitively impaired that they cannot possess the mental states necessary for a finding of first degree murder or a finding of the truth of the special circumstance of intentionally killing a police officer while the latter was engaged in the performance of his duties.

12. Such evidence strongly supported a defense that petitioner was physiologically incapable of premeditating, deliberating or forming the specific intent to kill that is necessary for a first degree murder finding and a death sentence.

13. Although Mr. Klump's overall defense plan at the guilt phase was to establish that petitioner did not

deliberate, premeditate, harbor malice, or form the intent to kill, due to his gross PCP intoxication, Mr. Klump never told Robert J. Bund, his investigator, about this defense strategy. [Deposition of William J. Klump ("Klump Depo."), 55:24-56:7.], [Deposition of Robert J. Bund ("Bund Depo."), 122:4-8.] Mr. Bund stated that it wasn't Mr. Klump's style to discuss legal theories about the case with his investigators and, in fact, Mr. Klump did not discuss legal theories with Mr. Bund about petitioner's case. [Bund Depo., 22:17-23:2.] Mr. Klump's failure to tell Mr. Bund the overall defense strategy for the guilt phrase falls far below the standards of reasonably competent assistance and made it virtually impossible for Mr. Bund to conduct an adequate investigation for the guilt phrase.

14. Mr. Bund did all of the investigating and interviewing of witnesses. The only investigation in this case that Mr. Klump did was to visit the scene of the crime, and to interview Dr. Orm Aniline. [Klump Depo., 38:20-39:5.] When it came time for the witnesses to be called at trial, Mr. Klump would have each defense witness review their statement from their earlier interview with Mr. Bund. Mr. Klump would tell them "that's what I am going to ask you. Is there any problems." Mr. Klump would not inform the witnesses of the particular questions that he was going to ask them, nor would he tell them how to answer such questions because Mr. Klump did not believe in "writing a script" for his witnesses. [Klump Depo., 39:18-25.] Mr. Klump failed to prepare his witnesses in any further manner. Moreover, as reflected by Mr. Klump's files, Mr. Bund failed to interview nine of thirteen defense witnesses that were presented at the

guild phrase. Consequently, these witnesses testified without any type of preparation.

15. Mr. Klump failed to appreciate the inherent difficulties in proving that petitioner did not premeditate, deliberate, or form the specific intent required for first degree murder. In fact, Mr. Klump believed that this case was not difficult because he did not have to "start beating the bushes and running around trying to find out 'who the real killer was'." [Klump Depo., 54:20-55:1.] Mr. Klump believed that the defense was based on the "People's evidence", the "People's witnesses", and the "People's analysis". All that the defense's investigation entailed was finding an expert "to testify to the diminished capacity and the effects of PCP." [Klump Depo., 54:9-16.] Mr. Klump's analysis of the guild phase fell below the standards of reasonably competent assistance because he failed to understand that: (1) diminished capacity was not a viable defense at the time of the trial, and (2) another significant aspect of the defense was to investigate the petitioner's incriminating statements concerning his memory of the incident that he allegedly made during the interrogations conducted by the Los Angeles County Sheriff's Department within the first twenty-four hours after the incident. Each of these two fatal mistakes are discussed in more detail *infra*.

16. Mr. Bund gave Mr. Klump a written report on each of the interviews that he conducted on potential trial witnesses. If there wasn't a written report on a witness in Mr. Klump's files, Mr. Bund had not interviewed such witness. [Klump Depo., 408:25-409:9.], [Bund Depo., 110:10-25, 117:11-23.] Apparently, nine out of the thirteen witnesses that Mr. Klump had testify at the guild phase

were never interviewed prior to the trial because there were no written reports on any of these witnesses in Mr. Klump's files. The nine witnesses that were not interviewed prior to trial are: Gregory Allen, Donald Daley, Sandra Downs, Adrian Mitchell[1], Gerald Osacho, Radford Roseborough, M.D., Beverly Shelton, Letitia Whittington, and David Zamarano. Mr. Klump's failure to have these nine witnesses interviewed prior to trial falls far below the standards of reasonably competent assistance. Mr. Klump's failure to have Mr. Bund interview each of the witnesses that he presented at the guilt phase of trial was very harmful to petitioner's defense. Unless it is impossible to do, a reasonably competent defense attorney should interview all witnesses that he intends to present at trial to prevent harmful surprises. Because neither he nor Mr. Bund had interviewed Adrian Mitchell, Mr. Klump was completely unaware of Adrian Mitchell's damaging testimony that the petitioner placed the shotgun down on top of the car and then picked it back up a second time immediately prior to killing Officer Wrede.

17. The vast majority of the investigation that Mr. Klump instructed Mr. Bund to conduct was to interview the 45 witnesses contained within the supplementary report prepared by the Los Angeles County Sheriff's Department and to ascertain whether such statements were accurate. [Klump Depo., 69:24-71:11.] Mr. Klump's interviewing technique of having Mr. Bund ask these

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[1] Mr. Bund apparently did not interview Mr. Mitchell because he was only twelve years old and his mother requested that he not be interviewed because Adrain was extremely nervous and sick as a result of witnessing the incident.

witnesses to sign on to their statements contained in the Sheriff's report can only be described as incompetent. Reasonably competent defense counsel would have used his own agenda to interview each of these witnesses and only afterwards he would show the witness the Sheriff's report to impeach or corroborate certain information. By using the Sheriff's report as the backbone of each interview, Mr. Bund was limited in being able to elicit information from these witnesses that fell outside the four corners of the Sheriff's report.

28. Although Mr. Klump instructed Mr. Bund to focus on contacting the civilian witnesses contained within the Sheriff's supplementary report, he gave Mr. Bund no further instructions on what type of information that he needed to establish the defense at the guilt phase. Mr. Bund conducted a total of 68 hours of investigation on the guilt and penalty phases of petitioner's trial. [Bund Depo., 145:6-16.] Reasonably competent defense counsel would have spent a minimum of several hundred hours investigating a case of this complexity.

19. Mr. Klump did not know if he personally interviewed Dr. Roseborough. Letitia Whittington, Gerald Osacho, Gary Allen, and David Zamarano, before each of them testified on behalf of the defense. [Klump Depo., 102:11-105:2.]

20. Mr. Klump did not instruct Mr. Bund to conduct any investigation outside of those persons that Mr. Klump instructed Mr. Bund to investigate because Mr. Bund already had enough to do. [Klump Depo., 337:15-19.] Mr. Klump stated that the only additional witnesses that he requested Mr. Bund to interview, other

than the forty-five witnesses previously identified by the Los Angeles County Sheriff's Department, would be listed in the investigative reports contained in the Public Defender's files. [Klump Depo., 106:19-24.] The investigative reports reflect that the only additional witnesses that Mr. Klump requested Mr. Bund to interview were representatives of the television stations which ran a news story regarding the incident. Moreover, Mr. Bund did not conduct any investigation in petitioner's case from January 9, 1984 until March 6, 1984. [Bund Depo., 180:7-22.]

21. Peter M. Williams, Mr. Klump's supervisor at the time of petitioner's trial, met with Mr. Klump from time to time before and during petitioner's trial to discuss petitioner's case. Mr. William [sic] wrote in his notes that Mr. Klump should make sure to interview the civilian witnesses to ascertain whether they heard petitioner use the term "pigs." [Deposition of Peter M. Williams, 39:12-14, 41:14-43:20.] If the civilian witnesses did not hear petitioner use the term "pigs," Mr. Klump could use this evidence to impeach Officer Chris Mohler's statement that he heard petitioner say, "I'll kill you fucking pigs." Reasonably competent defense counsel would have conducted such investigation because this statement is damaging since it can be used to show that petitioner was aware of what he was doing and to whom he was doing it. Mr. Klump failed to conduct such investigation.

22. The failure of not interviewing Gerald Osacho, a nurse at the Queen of the Valley hospital, prior to trial was also very harmful to petitioner's defense. Because Mr. Klump had not asked Mr. Osacho before trial about the Los Angeles County Sheriff's Department "booking

interview" of petitioner at the Queen of the Valley hospital, the prosecution was able to convince Mr. Osacho on cross-examination that petitioner asked if he was being charged with killing a cop despite the absence of any questioning or prompting. Moreover, although Mr. Klump thought that the medical records from the Queen of the Valley hospital were helpful because they showed that petitioner was under the influence of amphetamines and PCP, he failed to introduce them as an exhibit at trial. [Klump Depo., 89:12-90:17.] As a result, Mr. Klump was unable to elicit truly persuasive testimony from Mr. Osacho because Mr. Osacho needed these records to testify. Consequently, the prosecution was able to use each of these pieces of testimony in establishing premeditation and deliberation. Had Mr. Klump or Mr. Bund interviewed Mr. Mitchell and Mr. Osacho prior to trial, each of these fatal mistakes could have been avoided.

B. Defense Counsel Failed To Obtain And Review Readily Available Medical Records

23. Given the only available defense in this case, reasonably competent counsel would have undertaken a thorough investigation into petitioner's intoxicated condition during the incident. To do this, it was essential to obtain the available medical records from the two hospitals that treated petitioner on the day of the incident for the effects of PCP intoxication and for injuries sustained at the hands of the police during petitioner's arrest. These medical records also provide objective evidence that petitioner was not fully conscious, was not rational and appeared not to be processing thought shortly after

the incident. Such observations suggest that petitioner was experiencing a similar, if not even greater, deficit in reasoning ability when he shot the officer close in time to his ingestion of the drugs. For that reason, they should have been carefully reviewed by defense counsel prior to trial and utilized both for the preparation of witness testimony and as objective evidence of intoxication for the jury's consideration.

24. I have never experienced any difficulty in obtaining my client's local medical records upon presentation of a standard signed release. Since I have been furnished a copy of those records by petitioner's present counsel it is apparent that they would have been readily available to Mr. Klump had he sought them prior to trial. Since these records were necessary to support the defense contention that petitioner was highly intoxicated by PCP and, possibly, other drugs as well, Mr. Klump's failure to obtain them renders his performance as falling below the standard of reasonably competent assistance. In addition, it would have been essential for an expert witness to review these records before testifying, if such testimony was to carry any weight with the jury, as events at the trial sadly demonstrated.

C. Defense Counsel Misused The Defense's Only Expert Witness

25. Since the entire defense in this case was based upon the theory of petitioner's impaired mental functioning due to severe drug intoxication – subjects not within the common knowledge of the average juror – reasonably competent defense counsel would have understood the

vital need for effective expert testimony if the defense were to have any chance of prevailing. Any reasonably competent defense attorney would have also recognized that expert testimony is unlikely to carry much weight with a jury if it is couched in generalities rather than tied to specific facts of the case. Accordingly, reasonably competent defense counsel would have carefully and thoroughly prepared his expert witness, making sure he was familiar with the facts of the prosecution's case, the defendant's drug and addiction history, his psychiatric history, if any, and the defendant's condition at or near the time of the crime. Any "objective" data, such as medical records and the results of any testing the expert might conduct on the defendant are widely acknowledged by the criminal defense bar as providing the most persuasive basis for expert opinion. Any reasonably competent defense attorney should know this. Mr. Klump apparently did not.

26. Dr. Orm Aniline, a psychiatrist specializing in the treatment of PCP addicts, was called by the defense and examined with respect to the use and susceptibility to intoxication of persons ingesting PCP. He had not examined, tested or interviewed petitioner, had not reviewed the hospital records from Queen of the Valley and County General and had no information concerning petitioner's history of chronic drug use, addiction or recurring episodes of public PCP intoxication. These omissions were not the fault of Dr. Aniline. They were merely the most egregious of Mr. Klump's inexcusable neglect. In fact, Mr. Klump sent Dr. Aniline a letter where he "diplomatically" told Dr. Aniline that he did not want

him to interview petitioner because he did not want Dr. Aniline's views on petitioner. [Klump Depo., 192:16-23.] Mr. Klump only wanted Dr. Aniline to testify at trial as to the general "effects of a person under the influence of PCP." [Klump Depo., 193:8-12, 213:13-18.]

27. Mr. Klump erroneously believed that he was not allowed to ask Dr. Aniline any "specifics" about the PCP signs and symptoms that prevented petitioner from being able to premeditate, deliberate, harbor malice, or form the intent to kill because this would constitute testifying to an ultimate fact. [Klump Depo., 56:8-57:13.] In fact, Dr. Aniline was allowed to testify concerning petitioner PCP signs and symptoms and how such signs and symptoms show that petitioner was unable to premeditate, deliberate, harbor malice, or form the intent to kill.

28. The first time that Mr. Klump informed Dr. Aniline of the hypothetical that he would be asking Dr. Aniline was a half-an-hour before he testified. This conversation regarding the hypothetical lasted ten minutes at most and did not cover every item that would be asked of Dr. Aniline. [Klump Depo., 214:22-215:15, 217:25-218:11.] Furthermore, Mr. Klump failed to ask Dr. Aniline before he testified whether he believed petitioner actually premeditated or deliberated at the time of the incident. [Klump Depo., 203:1-19.] Reasonably competent counsel would have gone over in detail every aspect of Dr. Aniline's crucial direct examination to assure that everything goes smoothly and to avoid pitfalls on cross-examination.

29. Reasonably competent counsel would have caused Dr. Aniline to perform commonly utilized tests on

petitioner to develop detailed evidence that petitioner was physiologically and psychologically incapacitated by PCP to a degree that rendered him mentally unable to commit first degree murder. They would have provided an important objective state of facts to support the defense contention that petitioner was addicted to drugs, was profoundly under the influence of drugs at the time of the offense and was not, therefore, engaged in deliberative conduct at the time he shot the officer. These tests, which are described in Dr. Aniline's October 7, 1992 declaration filed with this Court, were not conducted on petitioner before his trial because Mr. Klump did not request testing and declined to give Dr. Aniline the opportunity to examine or test petitioner.

30. Reasonably competent counsel, having prepared his expert, would have elicited testimony from Dr. Aniline that petitioner was in a virtual unconscious state at the time of the shooting. In such a state petitioner could not have premeditated, deliberated, harbored malice or intended to kill. He further could not have understood, as a reasonable person might have, that his victim was a police officer engaged in the performance of his duties. As it was, when Dr. Aniline was asked by Mr. Klump if he had opinions about whether petitioner actually formulated the necessary mental states, he was obliged to admit that he had no way of knowing whether petitioner did nor did not. Based on my review of Dr. Aniline's declarations filed with this Court, it appears that, had Dr. Aniline reviewed the relevant evidence, examined and interviewed petitioner, and been asked the relevant questions during his testimony, he would have testified that Petitioner was unable to consciously process

rational thought during the incident and did not premeditate, deliberate, harbor malice or intend to kill.

31. Even without the routine preparation of Dr. Aniline outlined above, Mr. Klump could have made far better use of this highly qualified expert than his own befuddlement produced. It appears from his examination of the doctor that Mr. Klump had no understanding of the connection between drug intoxication and the defense of diminished *actuality*. Mr. Klump did not understand his defense of diminished actuality – the defense that petitioner's PCP-induced, amnestic cerebral state rendered him unable to premeditate, deliberate, harbor malice, or form the intent to kill and, therefore, petitioner did not premeditate, deliberate, harbor malice, or form the intent to kill Officer Wrede. Mr. Klump repeatedly kept asking the witness if petitioner's *capacity* to formulate the mental states was impaired by the drug until the prosecutor objected, leading the judge to inform Mr. Klump that the defense of diminished capacity had been eliminated by initiative. Mr. Klump's questions focused almost exclusively on trying to establish that petitioner was, in fact, intoxicated on PCP. What he totally failed to elicit from his witness was the crucial information that intoxication by PCP causes a gross impairment of the ability to consciously, rationally process thought. Moreover, Mr. Klump failed to elicit testimony form [sic] his expert psychiatrist that explains that the mental states of premeditation, deliberation, harboring malice, and intending to kill require a fairly high level of logical thinking, beyond the ability of someone "loaded" on PCP. Thus, the essential component of expert testimony in a defense based on impaired mental condition was ignored by Mr.

Klump. Mr. Klump erroneously believed that he only had to show that petitioner [was] "loaded" on PCP.

32. As it was, the misused Dr. Aniline mainly testified about the effects of PCP ingestion on a variety of users. Under Mr. Klump's misguided direction much of this testimony hurt the defense more than it helped it. By eliciting such misleading statements as that the effects of PCP are totally variable, that a chronic user would not be affected the same as a first time user, and that there is no established blood level of PCP to determine when the user is mentally incapacitated, Mr. Klump raised a strong inference that petitioner, a chronic user, was not significantly impaired in spite of his bizarre and irrational behavior, his total lack of memory of the incident and the results of the chemical tests on his blood and urine. All Mr. Klump needed to do to pull the ship of his defense off the rocks upon which he had grounded it was to ask Dr. Aniline to explain the significance of the 176 ngs/ml of PCP in petitioner's blood. Dr. Aniline would have said that this level was so extraordinarily high that it would incapacitate even a chronic user.

33. On cross-examination of Dr. Aniline, the prosecutor asked about examples of PCP levels that were higher than petitioner's tested levels, creating an erroneous impression that petitioner was not impaired relative to other PCP users. Reasonably competent defense counsel easily could have rehabilitated the witness on redirect; Dr. Aniline would have testified that the subjects of the prosecutor's examples, who had blood PCP levels which exceeded that of petitioner, were in a comatose state, incapable of performing even basic motor skills.

34. On cross-examination, the prosecutor elicited from Dr. Aniline that he had not examined, interviewed or even met with petitioner prior to trial. This created an erroneous and damaging impression that the defense had purposely withheld information from its own expert, leaving the jury to speculate that what was concealed conflicted with the defense contention that petitioner was incapacitated by drugs.

D. Defense Counsel Withdrew A Potentially Important Defense Witness For Erroneous Reasons

35. A forensic psychiatrist, Dr. John M. Mead had examined petitioner before trial and formed the opinion that at the time of the commission of the offense petitioner was grossly intoxicated with PCP and had little recollection of the day's proceedings. These were the two linchpins of the defense case. Reasonably competent counsel should have understood the importance of having an expert witness testify to these critical defense contentions, particularly since such testimony would have corroborated petitioner's own. From the trial record it appears that Mr. Klump wanted to call Dr. Mead to testify in the guilt phase. Before doing so, however, Mr. Klump sought an in limine ruling from the court to the effect that information contained in Dr. Mead's report concerning petitioner's family background and military service be deemed inadmissible. Mr. Klump conceded that he had erred in not requesting two separate reports from Dr. Mead, one addressing guilt phase issues, such as petitioner's intoxication at the time of the offense, and one addressing penalty phase issues, such as petitioner's background. This separation is the only thing that Mr.

Klump said he would do differently if he had to retry the case. [Klump Depo., 157:20-158:21.]

36. The prosecution objected to the court making a determination of admissibility without affording it the opportunity to examine the doctor's report and be heard. The court understandably agreed and requested Mr. Klump to show the report to the prosecutor. Mr. Klump refused and, in doing so, abandoned calling this critical witness. This refusal served no legitimate purpose of the defense and protected no fundamental rights of defendant petitioner. The prosecution already had complete access to petitioner' [sic] military history as his military record was in court for use by the prosecution in the penalty trial. The family history information in the report was relatively benign and could not have prejudiced the defense by virtue of the prosecutor being permitted to read it. Had the court been in a position to rule on Mr. Klump's in limine motion, under prevailing case authority the likely result would have been that the information Mr. Klump sought to shield would have been ruled irrelevant and inadmissible. Due to Mr. Klump's inexplicable stubbornness petitioner was denied Dr. Mead's beneficial testimony.

37. Despite knowing that Dr. Mead did not have any expertise in PCP intoxication, Mr. Klump wanted Dr. Mead to testify whether petitioner was under the influence of PCP and whether petitioner could premeditate or deliberate because of such intoxication. [Klump Depo., 162:1-3, 164:20-165:1.] Furthermore, after Mr. Klump received Dr. Mead's report and believed that Dr. Mead's report contained harmful background information, Mr. Klump never considered having Dr. Aniline take Dr.

Mead's place in testifying (1) whether petitioner was under the influence of PCP and (2) whether petitioner could premeditate, deliberate, harbor malice, or form the intent to kill. [Klump Depo., 195:9-21.]

E. Defense Counsel Failed To Interview And Prepare Critical Witness[es], Or Make Intelligent, Informed Decisions Regarding The Witnesses To Call For The Defense

38. Reasonably competent criminal defense counsel would have interviewed all witnesses to be called by the defense before putting them on the stand to testify. Especially in a capital case, nothing could be more fraught with peril than to call witnesses about whom defense counsel knows nothing more than the few lines written in a police report, as was done here. Not only did Mr. Klump fail to interview key witnesses prior to their testifying, such as the ambulance personnel, paramedics, and hospital personnel, the Public Defender's files reveal that Mr. Klump failed to interview nine of the 13 defense witnesses prior to trial that were presented at the guilt phase. Mr. Klump's failure to interview and investigate key witnesses results from his cavalier belief that this was not "a difficult case" and that the defense was "based on the People's evidence," "the People's witnesses," and "the People's analysis." [Klump Depo., 54:9-55:1.]

39. Just before petitioner was to testify at trial, Mr. Bund informed Mr. Klump that he found a witness who was at the hospital during the time in which petitioner was interrogated by the Los Angeles County Sheriff's Department. Instead of obtaining more information about

such witness, Mr. Klump told Mr. Bund that it's too late to interview or pursue this witness because petitioner was about to take the stand. Mr. Klump then told Mr. Bund to put the information about this newly discovered witness in an investigation report. [Klump Depo., 43:23-45:8.] At the very least, Mr. Klump should have interviewed such witness himself and then ascertained whether he should request the Court's permission to call this newly discovered witness to testify before petitioner testified. Mr. Klump's failure to appreciate that this witness could be crucial to combatting the prosecutor's assertion that petitioner premeditated and deliberated and Mr. Klump's failure even to interview this witness falls below the standards of reasonably competent assistance.

40. Additionally, Mr. Klump's inexcusable failure to obtain a copy of petitioner's medical treatment records from Queen of the Valley hospital impaired his ability to elicit beneficial information from the nurse who treated petitioner and led to the prosecution being able to turn the witness to its advantage. Nurse Gerald Osacho was called to testify regarding petitioner's condition upon arrival at the hospital and during his treatment over a two hour period. [Klump Depo., 258:8-24.] Not only had Mr. Klump failed to interview Mr. Osacho before trial. Mr. Klump had not subpoenaed the medical chart for use by the witness at trial. Throughout his questioning. Mr. Osacho repeatedly stated that he could not accurately answer Mr. Klump without reference to the chart, thus diluting any possible impact of his favorable testimony concerning petitioner's condition.

41. Mr. Klump's failure to provide Mr. Osacho with an accurate record with which to refresh his recollection took its toll on the defense during the prosecution's cross-examination. The issue was whether petitioner had made a statement to a police officer at the hospital which tended to indicate that he had some memory of the incident, contrary to his claim at trial of complete amnesia. The medical records did not indicate that such a statement was made. The police officer wrote a report, however, that claimed that it was made in Mr. Osacho's presence. Complaining of a lack of recollection without reference to the chart, the witness was shown a copy of the police report and, thus "refreshed", claimed to remember the statement as reported by the police officer. Mr. Klump was aware of this police report and of the alleged harmful statements made by petitioner contained within this report. [Klump Depo., 258:24-259:14.] Although Mr. Klump stated that he told Mr. Bund to investigate the law enforcement officers, ambulance personnel, hospital personnel, and paramedics concerning these alleged statements, Mr. Bund conducted no such investigation. [Klump Depo., 254:7-255:2.] [Investigation Report, Inv. No. 101-83-3.], [Bund Depo., 133:18-134:14.] Mr. Klump stated that he was not overly concerned about these alleged statements because petitioner could have overheard someone else talking about the incident in the hospital.

42. Three eyewitnesses to the altercation and shooting, interviewed by the police shortly after the incident, were called by defense counsel, ostensibly for the purpose of further describing petitioner's bizarre and irrational actions at the scene before the shooting. As their testimony unfolded it was obvious that Mr. Klump had

never interviewed them. He was clearly surprised when on both direct and cross-examination they provided information damaging to the defense that was not contained in the police reports of their statements. Thus, defense counsel's ill informed decision to call Sandra Downs, Adrian Mitchell and Beverly Shelton, intended to develop petitioner's mental impairment and lack of consciousness of guilt during the incident, was used instead by the prosecutor to prove petitioner's intent to kill. As in many other aspects of the trial, Mr. Klump's ill prepared and unfocused examination of these witnesses bespeaks a lack of tactics, a lack of strategy and a lack of sufficient information and understanding of his own theories of the defense to qualify as real assistance or advocacy.

43. Reasonably competent criminal defense counsel would have made efforts to interview all government witnesses before they were called to testify. Had defense counsel interviewed the police officers who arrived at the scene of the incident, and prepared for cross-examination, he could have challenged their testimony. Specifically, Officer Mohler testified that he heard petitioner use the word "pigs", reference to police officers. This evidence was used by the prosecution to prove that petitioner knew he was dealing with police officers after the shooting and, having pointed the shotgun at them, was further used to demonstrate petition's willingness to kill police officers. This was later argued effectively by the prosecutor to establish the elements of the special circumstance. This highly prejudicial and inflammatory testimony went unchallenged by Mr. Klump even though none of the civilian witnesses who were closer to petitioner than Officer Mohler, nor any other police witness,

heard petitioner make the alleged statement. Additionally, the accounts of witnesses who saw the encounter between petitioner and Officer Wrede differed markedly. Had counsel adequately prepared, he could have challenged the perceptions of the more damaging of these witnesses, those who claimed that petitioner specifically aimed the shotgun at Officer Wrede, with the accounts of other witnesses who were in a better physical position to view the events. Instead of exploiting these differences, Mr. Klump characterized the discrepancies in witness testimony as "minor". A reasonably competent criminal defense attorney would have emphasized the favorable versions of the events and argued their relationship to the concept of reasonable doubt. In fact, the Public Defender's files reveal that the only two prosecution witnesses that were interviewed before trial were Lucinda Smith and Leighton Holder. [Investigation Report, Inv. No. 101-83-4.] Moreover, of all the testimony elicited from the prosecution witnesses at trial, the testimony of Ms. Smith and Mr. Holder was the least harmful to petitioner's defense. Consequently, Mr. Klump failed to interview those prosecution witnesses whose testimony most needed to be diffused on cross-examination.

44. It was critical for defense counsel to effectively cross-examine Detective Lee as to his purported police interviews of petitioner, described in greater detail *infra*. Reasonably competent defense counsel would have asked Detective Lee about the purpose of these interviews. Detective Lee testified that he left the interviews after a short time and without asking follow up questions. From witnesses at the scene, the police had obtained statements about the circumstances surrounding Officer Wrede's

death. Additionally, it was clear that Detective Lee was aware that petitioner was injured and under the influence of drugs and medications during the interviews. Therefore, it is unlikely that Detective Lee conducted the interviews with a realistic expectation of obtaining accurate information from petitioner about the incident. Obviously, what he needed was some evidence to support a finding of first degree murder and to counter the obvious defense of extreme intoxication. Defense counsel made no attempts to show the existence of Detective Lee's motive to fabricate his damaging account of the interviews with petitioner. In fact, Mr. Bund was not even aware at the time of the investigation that there were statements in the police reports that implied that petitioner possessed some recollection of the incident. [Bund Depo., 122:17-25.] It wasn't until 1993 that Mr. Bund first learned from defense attorneys at Lewis, D'Amato, Brisbois & Bisgaard about these statements contained in the police reports. [Bund Depo., 122:17-123:15, 123:21-124:17, 124:23-125:14.] Consequently, Mr. Bund never personally contacted any of the police officers. [Bund Depo., 127:24-128:6.]

45. At the time of trial, Mr. Klump was completely unaware that Officer Wrede was married and that his wife had worked at Queen of the Valley hospital. [Klump Depo., 454:18-455:23.] In fact, Officer Wrede's wife, Denel, had worked in the emergency room at Queen of the Valley hospital and met Officer Wrede while she was working at Queen of the Valley hospital. [Deposition of Denel Lupiani-Duprez, 6:9-11, 10:7-10.] The fact that Officer Wrede and Denel met at Queen of the Valley hospital and that Denel had worked in the emergency room makes

it highly likely that hospital personnel discussed the incident at the time that petitioner was at Queen of the Valley hospital. In fact, Letitia Whittington, a nurse at Queen of the Valley hospital, stated that while she was treating petitioner on the day of the incident at Queen of the Valley hospital, a law enforcement officer stated in petitioner's presence that petitioner "just shot and killed my partner." [Deposition of Letitia Whittington ("Whittington Depo."), 30:6-14.] Furthermore, Ms. Whittington is sure that at some point a police officer came into the emergency room and told her that petitioner had shot and killed Officer Wrede. [Whittington Depo., 27:5-25.] Mr. Klump's failure to conduct any investigation of law enforcement officers, ambulance personnel, hospital personnel, and paramedics falls far below the standards of reasonably competent assistance, especially, in light of the fact that such investigation would have led to material evidence to contradict the prosecution's argument that petitioner had some memory of the incident.

F. Defense Counsel Put The Unprepared Defendant On The Stand And Incompetently Advised Him To Enter Guilty Pleas In Other Matters

46. Reasonably competent criminal defense counsel would have carefully weighed the advantages and disadvantages of calling petitioner to testify at trial. That does not seem to have been done here. There is no weaker or more suspect testimony than that of a defendant who claims not to remember his participation in a violent crime. The only fact that petitioner's testimony tended to prove, that was not provable from other witnesses that

the defense called, was his failure to remember the incident. This would have better been proven through the testimony of Dr. Mead, who, presumably would not have been as easy a target for discrediting as was petitioner. Petitioner's testimony presented the prosecutor with an opportunity to attack his credibility, which occurred. In my experience a jury makes little distinction between what it believes to be a lying defendant and a guilty one. The decision to call petitioner, an obviously ill prepared and inarticulate witness, if indeed it was a decision and not a mere whim, was so ill advised as to constitute another example of Mr. Klump's ineffective assistance.

47. Having made the wrong decision, Mr. Klump should have at least tried to elicit the few potentially useful facts that petitioner could have provided, specifically the fact that he was addicted to PCP and smoked it under the compulsion of that addiction rather than merely from a voluntary decision to get high. Additionally, defense counsel should have elicited from petitioner his history of drug abuse and prior incidents of black-outs and unconsciousness while under the influence of PCP.

48. Reasonably competent criminal defense counsel would not have advised petitioner to plead guilty to a number of pending PCP charges before trial. Petitioner did not plead guilty to these charges until after he was charged with first degree murder. These pleas created the impression that petitioner, who previously had denied the charges, now changed positions simply to bolster his defense. This sudden change made petitioner look like a manipulator and fabricator when, in fact, the idea originated with his counsel.

G. Defense Counsel Did Not Move To Suppress Prejudicial Evidence That Was Obtained In Violation Of Jackson's Fifth Amendment Rights

49. Nurse Gerald Osacho testified at trial that, at 3:00 p.m. on August 31, 1983, within three hours of the incidents, petitioner was subjected to a custodial interrogation which was not preceded by a warning respecting his constitutional rights. Detective Guzman asked him, "Do you know what you did" or "Do you know why you're here?" The medical records showed that, at that time, petitioner was strapped down, was still in a semi comatose-like condition, had been beaten by police officers, had multiple dog bites on his groin, had been catheterized, was urinating blood, had low blood pressure, and was dehydrated. He was also undergoing treatment for high levels of PCP in combination with other drugs. Petitioner allegedly responded, "I killed the policeman?" in questioning tone, shortly before being transferred to Los Angeles County Medical Center.

50. On that same date, at 5:50 p.m., Detective Lee questioned petitioner and stated that petitioner had waived his *Miranda* rights.

51. Petitioner allegedly asked why he had been arrested; the detective told him "murder". Petitioner allegedly responded, "I killed a policeman?" in a questioning voice. The detective told him that no mention had been made of a policeman. A few minutes later, petitioner allegedly repeated his question about why he was in custody. When told "murder," he allegedly responded, "I didn't kill that cop." The next day, September 1, 1983, at noon, petitioner was allegedly reinterviewed by Detective

Lee. Again, petitioner allegedly waived his *Miranda* rights and made two more "incriminating" statements. Petitioner was asked if he remembered Detective Lee and his partner, and allegedly responded, "Yeah, you are the two policemen who said I killed that cop with a shotgun." It was then pointed out to petitioner that no mention had been made of a shotgun. Petitioner then allegedly stated that he must have read about the shotgun in the newspaper. The detective asked petitioner how he could read a newspaper when his hands were restrained and his eyes were almost swollen shut. Petitioner allegedly responded that he was unsure where he had obtained information about the shotgun.

52. Mr. Klump believed that petitioner's statements – "I killed a policeman?", "I didn't kill that cop.", and "Yeah, you are the two policemen who said I killed that cop with a shotgun." – were helpful to the defense because they were consistent with petitioner not knowing what happened. [Klump Depo., 273:20-274:18, 288:10-289:13.] Mr. Klump did not believe that the statement "I killed a policeman?" indicated that Mr. Jackson had any recall of the facts and circumstances surrounding the incident. [Klump Depo., 274:19-23.] Mr. Klump did not file a motion to suppress because petitioner made this statement in a questioning manner that Mr. Klump believed showed a lack of knowledge on petitioner's part. Mr. Klump completely misunderstands that a motion to suppress these statements would not based upon whether petitioner showed a lack of knowledge, but rather whether petitioner was able to voluntarily, knowingly, and intelligently waive his *Miranda* rights. Mr. Klump also misunderstands the fact that petitioner

allegedly used the words kill and cop in the same sentence is harmful even though petitioner made this statement in a questioning voice. Furthermore, Mr. Klump belief [sic] that he could explain in closing argument that petitioner learned this information by overhearing a conversation about the incident – even though Mr. Klump had no evidence of such conversation – is unreasonable. [Klump Depo., 276:4-277:2; 277:13-279:6.]

53. Even though petitioner's medical records showed that petitioner was in a semi-comatose-like condition, had been beaten by police officers, had multiple dog bites on his groin, was catheterized, was urinating blood, had low blood pressure, and was dehydrated at the time of these interrogations, Mr. Klump also did not bring a motion to suppress these incriminating statements because he believed that petitioner's mental state was such that petitioner could give a valid *Miranda* waiver. [Klump Depo., 281:5-282:4.] Mr. Klump however, formed this belief without conducting any investigation surrounding the voluntariness of these statements. Mr. Klump never met or interviewed Nurse Osacho who testified about Detective Guzman's interrogation. Reasonably competent defense counsel would have understood that petitioner's physical and mental condition rendered him incapable of waiving his *Miranda* rights and was a result would have moved to suppress the allegedly incriminating statements made by petitioner during the sheriff's interrogations. Moreover, reasonably competent defense counsel would have realized that it would be nearly impossible to explain that petitioner learned about

the incident from overhearing other people's conversations about the incident without any evidence of such conversations.

54. Mr. Klump did not ask Mr. Bund to pursue investigation to determine whether petitioner could have learned about the incident from overhearing others talking about it in his presence. [Bund Depo., 128:14-129:18.] Had Mr. Klump investigated and interviewed the law enforcement officers, paramedics, and hospital personnel who were within earshot of petitioner before petitioner made any of these allegedly incriminating statements, Mr. Klump would have learned of several sources where petitioner overheard conversations regarding the incident. These sources include:

(a) Nurse Whittington stated that she was sure that a police officer came in the emergency room of Queen of the Valley Hospital and said that petitioner had killed a police officer. [Whittington Depo., 27:16-25.] Ms. Whittington also stated that a police officer told her at the Queen of the Valley hospital in petitioner's presence that petitioner had "just shot and killed my partner." [Whittington Depo., 30:6-14.] Because Ms. Whittington left queen of the Valley hospital at approximately 3:00 p.m., this statement made by the police officer was made before petitioner allegedly made any of the incriminating statements.

(b) Officer Frank Harden of the West Covina Police Department learned of the shooting of Officer Wrede because it was broadcast over the intercom throughout the West Covina police station. [Deposition of Frank

Howard Harden, IV, ("Harden Depo."), 38:23-39:11.] Officer Harden did not recall anyone turning off the paging system or the intercom at the West Covina Police Department while petitioner was present. [Harden Depo., 60:24-61:4.] Therefore, petitioner likely heard details of the incident while he was detained at the West Covina Police Department before being transported to Queen of the Valley Hospital. Officer Harden also recalls that the incident was "all that people were talking about" on the day of the incident. [Harden Depo., 57:19-25.] Most significantly, Officer Harden recalls conversations taking place about the incident amongst law enforcement officers and paramedics in petitioner's presence while petitioner was at the West Covina Police Station. Officer Harden stated that there was "chaos" at the West Covina Jail and that there were "a bunch of folks around in uniform trying to deal with the situation." [Harden Depo., 64:10-65:6.]

(c) Officer Michael J. Lee of the Los Angeles County Sheriff's Department, the officer in charge of homicide investigation, did not investigate every person who was within earshot of petitioner to determine if there was any mention regarding the fact of a policeman being killed between the time petitioner was taken into custody and the time of the first interview at 5:50 p.m. [Deposition of Michael J. Lee ("Lee Depo."), 55:6-21.]

Despite knowing of these witnesses because each appeared in the police reports, Mr. Klump failed to interview any of them and obtain such testimony to rebut the prosecution's assertion that petitioner possessed some independent reco[illegible]ion of the incident. Reasonably competent defense counsel would have interviewed and investigated these witnesses to obtain this type of testimony. Mr. Klump's failure to conduct such investigation is inexcusable.

55. Despite not having any witness to testify that petitioner overheard the information contained in the statements allegedly made by petitioner during these interrogations, Mr. Klump refused to interview or call a witness that was found during trial who apparently had information regarding these statements. [Klump Depo., 43:23-45:14.] Even though this witness may have had helpful information regarding where petitioner learned of the incident, Mr. Klump refused to interview or pursue this witness because he had already told the Court that petitioner was going to testify next and that petitioner was the last witness. [Klump Depo., 45:15-46:17.] Mr. Klump's failure to request the Court to stay the trial so that he could interview and pursue this witness falls below the standards of reasonably competent assistance. Even if the Court denied this request, petitioner would have grounds for appeal assuming that petitioner could show that this witness possessed material information. Mr. Klump's failure to make this request foreclosed petitioner's ability to use this witness on appeal.

56. Medical records indicate that, at the time these alleged interviews occurred, petitioner was tied down to the bed, was recovering from his altercation with the

police, and from a combination of drugs in his system, and was in need of kidney dialysis. Any reasonably competent criminal defense attorney would have challenged these statements pretrial on the grounds that under the circumstances in which these statements were made, and in view of the irrationality of the utterances attributed to petitioner, serious issues of voluntariness and competency to waive his *Miranda* rights were presented.

57. On May 15, 1984, petitioner's wife sent a letter to the trial court which stated that she had visited petitioner every day after the incident while he was hospitalized. She stated that she had asked petitioner if he knew what he had done and she told him that he had shot and killed a policeman. She stated that petitioner believed he was innocent and asked her to bring a newspaper so that he could see for himself. Petitioner's wife stated that when she visited petitioner at the Los Angeles County Medical Center petitioner told her that some sheriffs kept coming in to his hospital room and telling him that they were going to kill him. [Deposition of Sabrina Jackson, 169:12-170:13.] Because Mr. Bund interviewed petitioner's wife for less than an hour and such interview only covered the penalty phase. Mr. Klump never learned about the sheriffs' death threats. [Bund depo., 193:15-191:1.] Reasonably competent defense counsel would have interviewed petitioner's wife concerning her hospital visits of petitioner to ascertain if petitioner could have learned of the incident from her. Such an interview also would have revealed these sheriff death threats made to petitioner. Mr. Klump's failure to interview petitioner's wife in preparation for the guilt phase falls below standards of reasonably competent assistance.

58. Although Mr. Klump was aware that petitioner's wife brought petitioner a newspaper regarding the incident and read such newspaper to him, there is nothing in the Public Defender's files to indicate that Mr. Klump or Mr. Bund interviewed petitioner's wife about this subject. [Klump Depo., 300:6-302:9.]

59. Defense counsel failed to explain to the jury that, even if petitioner could partially recall the incident, his ability to process thought during the incident was still grossly impaired. Counsel treated these two issues as one, creating an erroneous inference that petitioner's alleged statements demonstrated his ability to premeditate, deliberate, harbor malice, or form the intent to kill.

60. Had defense counsel investigated the circumstances surrounding the making of the statements and moved to suppress them, there is a strong possibility that he would have prevailed. Failure to advance petitioner's Fifth Amendment rights renders Mr. Klump's performance as below the standards of reasonably competent representation.

H. Defense Counsel's Lack Of Understanding Of The Facts And Issues Of The Case Prevented Him From Explaining Them To The Jury

61. Defense counsel did not give the jury any defense theory upon which it could base its findings, or provide the jury with proper guidance either by an opening statement or in presenting the defense. Rather, he simply presented the jury with some facts, leaving it to wade through them and choose, on its own, the facts it found to be significant. Mr. Klump never explained to the

jury the legal significance of the intoxication evidence. Rather, his closing argument conveyed that he was uncertain about the appropriate degree of culpability in these circumstances. He failed to act as petitioner's advocate.

62. On the contrary, defense counsel seemed to concede the prosecution's case throughout the trial. On several occasions, he complimented the prosecutor or validated the effectiveness of his presentation of the case.

63. Mr. Klump deferred his opening argument until the prosecution rested their case because he wanted to separate the prosecution's case from the defense's case and because he wanted to get a good idea of what the prosecution's case was before he had to give his opening argument. [Klump Depo., 376:6-377:13.] As a consequence of Mr. Klump deferring his opening argument, each juror had an image imbedded in his head of petitioner being a drug addict who had no respect for the law and whose actions show that he was aware that he killed Officer Wrede. By the time that Mr. Klump gave his opening argument, it was virtually impossible to convince the jury that petitioner's PCP-induced, amnestic cerebral state rendered him unable to premeditate, deliberate, harbor malice, or form the intent to kill. Reasonably competent defense counsel would realized [sic] that it was essential to give an opening statement in the beginning of trial to capture the jury's attention and to tell the jury the defense's version of what actually happened on August 31, 1983. Because of the complexity of the case, the jury needed to hear right from the beginning that petitioner's bizarre behavior and disorientation reveal that petitioner's PCP-induced cerebral state rendered him unable to premeditate, deliberate, harbor malice, or form the

intent to kill. Mr. Klump completely misunderstands the purpose of an opening statement by stating that he deferred giving his in order to learn what the prosecution's theory of the case before having to give his own. Had Mr. Klump conducted a reasonably competent investigation of the case before trial, he would have known exactly what the prosecution's case was.

III.

DEFENSE COUNSEL FAILED TO CONDUCT A VOIR DIRE THAT ADEQUATELY SCREENED THE JURY

64. Reasonably competent criminal defense attorneys recognize that during voir dire in a capital trial, counsel has an obligation to:

(1) insure effective procedures for the selection of jurors;

(2) identify and challenge for cause those jurors whose pro-death penalty views make them ineligible;

(3) identify and challenge for cause those jurors who harbor bias against the accused or for the prosecution in areas other than the death penalty;

(4) attempt to rehabilitate jurors who express reservations regarding the death penalty;

(5) gather information for use in peremptory challenges; and

(6) intelligently use peremptory challenges.

65. With regard to each of these tasks, defense counsel's performance, considering all the circumstances was ineffective.

66. Defense counsel brought a Motion to Preclude or Limit Voir Dire of the Jury. He was attempting to secure from the court a ruling that neither side should be permitted to question the prospective jurors on their death penalty views following the court's mandatory *Witherspoon* questioning. The Motion was denied. This was a common defense tactic in the 1960's when public opinion was more or less evenly split on the desirability of capital punishment. It is a long discredited practice among reasonably competent defense counsel practicing in the 1980's. Mr. Klump, an apparent adherent to his outmoded view generally asked no questions of jurors during the death qualification phase. Typically, the death opposed revealed themselves with little prodding from the judge or prosecutor. The ardently pro death jurors remained virtually invisible. Of the jurors who were actually seated, Mr. Klump asked questions of only one of them.

67. The prosecutor and the Court screened the anti-death potential jurors. Not only did defense counsel fail to make any attempt to rehabilitate these individuals, he stipulated to their release.

68. Reasonably competent counsel would have asked each potential juror how she or he felt about the death penalty and followed up on those who expressed strong pro death views with a view to challenging for cause those who could not consider mitigating evidence in a case involving the killing of a police officer. Mr. Klump abdicated his role in the juror screening process by asking no questions aimed at revealing juror attitudes toward the death penalty.

69. This was a case that had been extensively covered in the local press. Mr. Klump didn't ask a single juror what he or she had read, viewed, or heard about the case through exposure to this press coverage. Whether any of the jurors who sat on the jury had been exposed to the publicity and had formed an opinion about the guilt of the defendant as a result of that exposure remained a mystery.

70. In these circumstances, a reasonably competent criminal defense attorney also would have been aware that there was a substantial risk that racial bias could play a role in the jury deliberations, and would have explored the racial attitudes of the potential jurors.

71. Trial counsel failed to voir dire any jurors regarding their racial attitudes, and engaged in jury selection in complete ignorance of the racial attitudes of the prospective jurors.

72. Competent defense counsel would have elicited from potential jurors their attitudes about police officers and the killing of police officers. Not only did Mr. Klump fail to determine the jurors' views on this critical issue, he allowed to remain on the jury a West Covina fireman and a former matron at the Pomona City Jail without exploring their potential bias against an accused killer of a West Covina policeman.

IV.

DEFENSE COUNSEL'S PERFORMANCE DURING THE PENALTY PHASE OF TRIAL VIOLATED THE SIXTH AMENDMENT

73. In a capital case, it is imperative for the defense to develop as full a mitigating history for the penalty phase as possible. The defense's preparation and presentation at this stage is likely to make the difference between life and death. A reasonably competent criminal defense attorney will investigate the defendant's life history, including interviewing the defendant and obtaining from him the names of relatives, friends, his employment history, and background information about education, military experience, medical history, and personal references. Steps should be taken to locate and interview not only every living relative who had any significant contact with the defendant but also neighbors, friends, teachers, coworkers, doctors and ministers.

74. Given the facts of this case, reasonably competent criminal defense counsel would have investigated petitioner's history of drug use – including when he began using drugs, why he began using drugs, who introduced him to drugs, how long he continued to use drugs, and whether, in view of his numerous arrest for drug use and related crimes as a juvenile and an adult, he had been able to obtain any treatment for his drug problem. Additionally, the availability of drugs in petitioner's neighborhood and the extent of drug use there should have been investigated. It was clear from the onset of the case that this defendant had been heavily addicted to drugs long before the incident. To the contrary of what a reasonably competent defense attorney would believe, Mr. Klump

believed that the information contained in Dr. Mead's report concerning petitioner's history of drug abuse was harmful. [Klump Depo., 169:10-25.] Furthermore, Mr. Klump didn't use Dr. Mead at the penalty phase because Mr. Klump wanted to "keep as much information away from the jury as to [petitioner's] background. . . . " [Klump Depo., 182:2-23.]

75. Reasonably competent criminal defense counsel would have obtained petitioner's juvenile court records, which, it has been my experience, are readily available from the local juvenile court upon request. These records document petitioner's long term drug use and his difficulties in growing up in a chaotic home environment. These records also contain a 1970 psychiatric report which diagnosed petitioner as a "latent schizophrenic". That report also represents that petitioner has an I.Q. of 76, which is well below average. Mr. Klump did not possess any of this information. [Klump Depo., 316:20-317:3.]

76. Defense counsel only called two witnesses at the penalty phase – petitioner's mother and wife. Mr. Bund only spent a total of one hour interviewing petitioner's mother and wife. [Bund Depo., 193:15-194:1.] In fact, Mr. Bund was seriously concerned that he wasn't doing enough investigation concerning the penalty phase. [Bund Depo., 56:11-57:4.] Mr. Bund felt that he got a late start on investigation [sic] the penalty phase and that he would have liked to have started such investigation at the beginning of the case. [Bund Depo., 57:5-12.] When Mr. Bund told Mr. Klump that more should be done on the penalty phase investigation and that Mr. Bund felt that he should interview petitioner, Mr. Klump disregarded Mr.

Bund's concerns. [Klump Depo., 57:22-58:8.] The first time that Mr. Klump actually spoke with petitioner's mother and wife was on the day that each of them testified during the penalty phase. [Klump Depo., 348:23-349:17.] Overall, Mr. Klump clearly did not prepare these witnesses. Witnesses in a penalty phase must be cautioned to give specific examples of sympathetic or noteworthy behavior by the accused and to refrain from taking global statements such as "he's a wonderful person" since such broad strokes seeking to establish good character can open the door to the prosecutions's use of bad character evidence. Reasonably competent defense counsel in such cases understand that good character, as such, is not the issue in a penalty phase. The issue is whether this convicted murderer, notwithstanding his crime, is worthy of the exercise of mercy. Anything, therefore, that contradicts the notion that he freely choose to do evil when in full possession of his faculties has been successfully utilized in capital trials to persuade juries to spare a life. Petitioner's extensive history of drug addition should have been presented as a mitigating factor. However, his wife, upon Mr. Klump's examination gave impression that petitioner was a selfish man who abandoned his family for the pursuit of drugs. His mother's testimony, equally unguided by the informed hand of competent counsel, made vague statements such as "he's a good boy" and he "did well in school", which not only failed to help the jury individualize petitioner but failed to explain why he went so wrong. His mother further testified that petitioner was an individual who didn't bother with other people. What she apparently meant was that he kept to himself and made no trouble for

others. Without elaboration, however, this testimony, instead of conveying that petitioner was a peaceable person unless provoked, suggested that he was unsociable and uncaring of others.

77. Mr. Klump's strategy for the penalty phase was to have Mr. Bund interview family members and anyone else who knew something about petitioner's background. [Klump Depo., 347:6-17.] Petitioner's mother told Mr. Bund that one of petitioner's coaches thought highly of petitioner and petitioner's mother said that she would locate this coach for Mr. Bund. The Public Defender's files reflect that neither Mr. Bund nor Mr. Klump followed up with petitioner's mother to ascertain where this coach lived.

78. During the cross-examination of petitioner's mother the prosecutor elicited information about petitioner's juvenile crimes. This information was inadmissible, being neither statutory aggravation nor proper rebuttal. Mr. Klump made no objection to this highly prejudicial line of questioning. Reasonably competent defense counsel would have objected to the introduction of such evidence – an objection that should have been sustained. Furthermore, reasonably competent defense counsel would have obtained and reviewed petitioner's juvenile records prior to trial to ascertain whether they contained either helpful or hurtful information. Mr. Klump failed to have this done. [Bund Depo., 136:21-25, 137:21-138:3.]

79. Reasonably competent counsel would have investigated the evidence of the alleged sodomy incident which was presented in aggravation as an uncharged

offense involving the use of force and violence. Such an investigation would have included interviewing the alleged victim, George Taylor, ("Taylor") and attempting to locate and interview the other people who were in the barracks at the time of the alleged incident. Even without an investigation Taylor's recitation of the incident was very peculiar. Even though petitioner told Mr. Klump that the Army's report concerning the sodomy incident was incorrect, Mr. Klump does not recall ever interviewing Mr. Taylor nor instructing Mr. Bund to interview Mr. Taylor prior to trial. [Klump Depo., 374:3-20.] Mr. Klump barely questioned him, conveying the clear impression that Taylor's story was unimpeachable.

80. Reasonably competent counsel would have requested a hearing outside the presence of the jury to determine whether this lurid act, in fact, constituted a crime involving the use of force or violence. Taylor's testimony is totally devoid of any reference to force, threats, or violence. The entire episode should have been excluded and probably would have been had Mr. Klump requested a hearing. Failing that, he should have objected when the evidence came in and moved to strike it. If anything said at the penalty trial contributed to petitioner's sentence of death it was this improperly admitted, enormously prejudicial testimony.

81. Reasonably competent defense counsel would have interviewed petitioner to obtain helpful background evidence in preparation for the penalty phase. Mr. Klump does not recall ever talking with petitioner in order to obtain such leads on background information. [Klump Depo., 362:11-17.] Moreover, Mr. Klump never considered continuing the trial on the penalty phase because Mr.

Klump "felt that there was nothing we were going to be looking for that we didn't already have." [Klump Depo., 362:18-24.] Mr. Klump based his belief on Mr. Bund's investigation reports. [Klump Depo., 362:25-363:2.] Remarkably, Mr. Bund's investigation reports reflect that his entire penalty phase investigation consisted of interviewing petitioner's wife and mother for a total of one hour and making a few phone calls to subpoena records. [Bund Depo., 193:15-194:1.] Mr. Klump also did not request Mr. Bund to conduct any further penalty investigation after petitioner was convicted of first degree murder at the guilt phase. [Bund Depo., 192:15-193:7.]

82. Reasonably competent criminal defense counsel would have recognized the importance of presenting psychiatric testimony at this phase of trial. Psychiatric testimony should have developed the evidence of schizophrenia and its possible causation of petitioner's drug use, which may have been a self-medicating technique.

83. Dr. Mead clearly should have been called as a witness at this point. There was *no* reason not to call him. Psychiatric testimony should have explained the effects of drug addition to the jury in order to counteract the prosecutions's argument from the guilt phase that petitioner's intoxication on the day of the offense was purely an act of free will.

84. Reasonably competent defense counsel would have conducted extensive interviews of petitioner's family and friends to obtain the type of information that is contained in the declarations that Dr. Jay M. Jackman relied upon in rendering his expert opinions dated

November 12, 1995, and December 29, 1995. The only persons that Mr. Bund interviewed with respect to petitioner's penalty phase investigation was petitioner's mother and wife. Mr. Bund did not attempt to interview any of petitioner's eleven brothers and sisters or numerous aunts and uncles even though all of them lived in southern California. Moreover, because the average person is not well versed in psychiatry, reasonably competent defense counsel would have retained a psychiatrist like Dr. Jackman to explain to the jury the significance of the information contained in the declarations of petitioner's family and friends. If Mr. Klump interviewed petitioner's family and friends, called these individuals as witnesses at the penalty phase, and retained an expert to explain the significance of their testimony, petitioner would not have been sentenced to death.

85. Overall, had Mr. Klump not made the foregoing errors and omissions petitioner would not have been convicted of first degree murder and sentenced to death. Furthermore, even assuming for the sake of argument that petitioner was constitutionally convicted of first degree murder, petitioner would not have received a death sentence had Mr. Klump not made the foregoing errors and omissions that he made at the penalty phase of trial.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 9th day of January, 1996, at Los Angeles, California.

/s/ Leslie H. Abramson
Leslie H. Abramson

PROOF OF SERVICE

Case Name: Jackson v. Calderon, U.S.D.C. Case No. CV 91-4249-R

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On the date of execution below, I served the following described as: **NARRATIVE STATEMENT OF DIRECT TESTIMONY OF LESLIE H. ABRAMSON, ESQ.** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

[X] **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **(BY TELECOPY) BY STIPULATION** I caused such document to be delivered by telecopy transmission to the offices of the addressee.

[ ] **(BY PERSONAL DELIVERY)** I caused such envelope to be delivered by hand to the offices of the addressee.

[ ] **(BY FEDERAL EXPRESS)** I caused such envelope to be delivered by Federal Express to the offices of the addressee.

[X] **(FEDERAL)** I declare that I am employed in the offices of a member of this court at whose direction the service was made.

Executed on January 9, 1996, at Los Angeles, California.

/s/ Celia Ulloa
Celia Ulloa

MICHAEL ANTHONY JACKSON V.
ARTHUR CALDERON
USDC Case No. CV 91-4249-R

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PROOF OF SERVICE

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/s/ Celia Ulloa
Celia Ulloa

MICHAEL ANTHONY JACKSON V.
ARTHUR CALDERON
USDC Case No. CV 91-4249-R

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